Supreme Court, U.S.
FILED

(1)

No. 03-826 NOV 26 2003

IN THE

Supreme Court of the United States

DIANA L. READ,

Petitioner,

v.

ALEX BROWN, *et al.*,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

HAL K. GILLESPIE *
GILLESPIE, ROZEN
& WATSKY, P.C.
3402 Oak Grove Avenue
Suite 200
Dallas, Texas 75204
214-720-2009

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

62 pp

QUESTIONS PRESENTED

1. Does this Court's *Desert Palace* decision apply at the summary judgment phase of litigation, and if so, what is its impact?

2. Does *Desert Palace* apply to discrimination cases under the ADEA?

3. What are the appropriate standards for lower courts to follow in making a direct-evidence determination in discrimination cases under Title VII and the ADEA?

4. Does direct evidence of age discrimination expire as a matter of law, and if so, after how long?

5. Under *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 L.Ed.2d 105 (2000) may the court on summary judgment require "substantial evidence" of pretext, ignore the plaintiff's best pretext evidence and restate the other pretext evidence in the light most favorable to the summary judgment movant?

LIST OF PARTIES AND RULE 29.6 LIST

The parties before the Court of Appeals and this Court are listed below. To Petitioner's knowledge, BT Alex Brown, Inc. has no parent companies or non-wholly owned subsidiaries.

Diana L. Read	Plaintiff/Petitioner
Hal K. Gillespie	Attorney for Plaintiff/Petitioner
Cheryl A. Rubenstein	Attorney for Plaintiff/Petitioner
BT Alex Brown, Inc.	Defendant/Respondent
Mark A. Shank	Attorney for Defendant/Respondent
Christie A. Newkirk	Attorney for Defendant/Respondent
David Ellis	Attorney for Defendant/Respondent

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND RULE 29.6 LIST	ii
TABLE OF AUTHORITIES	vi
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. Nature of the Case and Proceedings Below	2
B. Factual Background	3
REASONS FOR GRANTING THE WRIT	8
I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE OF A SPLIT IN THE CIRCUITS AND THE IMPORTANCE OF ESTABLISHING WHETHER *DESERT PALACE* APPLIES AT THE SUMMARY JUDGMENT PHASE, AND IF SO, WHAT IS ITS IMPACT	9
II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE OF A SPLIT IN THE CIRCUITS AND THE IMPORTANCE OF ESTABLISHING WHETHER *DESERT PALACE* APPLIES UNDER THE ADEA AS WELL AS UNDER TITLE VII	12

TABLE OF CONTENTS—Continued

Page

III. THIS COURT SHOULD GRANT CERTIORARI BECAUSE OF A SPLIT IN THE CIRCUITS OVER THE DEFINITION OF DIRECT EVIDENCE, THE CONFLICT BETWEEN THE FIFTH CIRCUIT RULE AND *PRICE WATERHOUSE V. HOPKINS* AND THE NEED FOR A WORKABLE DEFINITION 16

IV. THIS COURT SHOULD GRANT CERTIORARI BECAUSE OF A SPLIT IN THE CIRCUITS IN GIVING EFFECT TO *REEVES* AND THE IMPORTANCE OF ADHERING TO *REEVES* AND OTHER DECISIONS OF THIS COURT 22

A. The Fifth Circuit in *Read* Breaks With All Other Circuits and Undermines Important Rulings of this Court by Ruling that Direct Evidence of Prohibited Discrimination Expires as a Matter of Law; If Direct Evidence "Expires," It Is Important to Know the Shelf Life of Direct Evidence 22

B. The Fifth Circuit in *Read* Departs from All Other Circuits and Undermines *Reeves* by Ruling That Nonmovants Asserting Pretext Must Have "Substantial Evidence" of Pretext, Ignoring Nonmovant's Best Pretext Evidence and Restating Her Other Evidence of Pretext in the Light Most Favorable to the Employer 24

TABLE OF CONTENTS—Continued

Page

1. In *Read* the Fifth Circuit Requires the Movant to Have "Substantial Evidence" of Pretext 24

2. In *Read* the Fifth Circuit Reverts to its pre-*Reeves* Summary Judgment Approach of Omitting Favorable Evidence to the Nonmovant and Viewing Evidence in Favor of the Employer 26

CONCLUSION 29

APPENDICES 1a

TABLE OF AUTHORITIES

CASES	Page
Allen v. City of Pocahontas, Arkansas, 340 F.3d 551, 557 (8th Cir. 2003)	11
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986)	26
Bauer v. Albemarle Corp., 169 F.3d 962, 966 (5th Cir. 1999)	13
Blow v. City of San Antonio, Texas, 236 F.3d 293, 296 (5th Cir. 2001)	23
Bolander v. BP Oil Co., _ F.Supp.2d _, 2003 WL 22060351 (N.D.Ohio, 2003)	14
Campetti v. Career Educ. Corp., _ F.Supp.2d _, 2003 WL 21961438 (E.D.Pa. 2003)	11
Dare v. Wal-Mart Stores, Inc., 267 F.Supp.2d 987, 992 (D.Minn. 2003)	11, 12
Davis v. Emery Worldwide Corp., 267 F.Supp.2d 109, 120, fn.2 (D. Me. 2003)	11
Desert Palace v. Costa, __ U.S. __, 123 S.Ct. 2148 (2003)	8-19
Dugan v. Albermarle County School Board, 293 F.3d 716, 721 (4th Cir. 2002)	25
Dunbar v. Pepsi-Cola General Bottlers of Iowa, Inc., _ F.Supp.2d _, 2003 WL 22290229 *11 (N.D.Iowa, 2003)	11
Fisher v. Transco Services-Milwaukee, Inc., 979 F.2d 1239, 1245, n. 4 (7th Cir. 1992)	15
Gonzales v. City of Minneapolis, 267 F.Supp. 1004, 1010 (D. Minn. 2003)	11
Goodman v. Pennsylvania Turnpike Comm., 293 F.3d 655, 673-74 (2nd Cir. 2002)	25
Griffith v. City of Des Moines, _F.Supp.2d _, 2003 WL 21976027 (S.D. Iowa, 2003)	11
Hornsfeld v. City of North Miami Beach, 29 F. Supp.2d 1357, 1365 (S.D. Fla 1998)	15

TABLE OF AUTHORITIES—Continued

Page

Jackson v. Catholic Charities, _F.Supp.2d _, 2003 WL 22533330, *2 (D.Minn. 2003)..... 11
Kozlowski v. Hampton School Bd., _ F.3._, 2003 WL 22273073, *4 (4th Cir. 2003)..... 14
McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 1825-26 (1973).....10-12, 15, 18
McKennon v. Nashville Banner Publishing Co., 513 U.S. 352, 115 S.Ct. 879 1995)..... 15
Mickle v. Morrin, 297 F.3d 114, 120 (2nd Cir. 2002)..... 27
Miller-El v. Cockrel, 537 U.S. 322, 123 S.Ct. 1029 (2003)..... 24
O'Neal v. City of New Albany, 293 F.3d 998, 1005 (7th Cir. 2002) 25
Otero v. Bridgeport Housing Authority, 297 F.3d 142, 151 (2nd Cir. 2002) 27
Price Waterhouse v. Hopkins, 490 U.S. 228, 104 L.Ed. 2d 268 (1989)..... 18, 20
Rangel v. El Paso Natural Gas Co., 996 F.Supp. 1093, 1097 (D.N. M. 1999) 15
Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147 L.Ed.2d 105 (2000).....9, 15, 21, 23-26
Rowland v. American General Finance, Inc., 340 F.3d 187 (4th Cir. 2003) 13
Sandstad v. CB Richard Ellis, Inc., 309 F.3d 893, 897 (5th Cir. 2002) 21
Skomsky v. Speedway Superamerica, L.L.C., 267 F.Supp.2d 995, 1000 (D. Minn. 2003)..... 15
Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 67 L.Ed 2d 207 (1981)..... 17

TABLE OF AUTHORITIES—Continued

	Page
Thompson v. Proviso Township High Schools Dist. 209, _ F.Supp.2d _, 2003 WL 21638808, *8 (N.D.Ill. 2003)	11, 13
Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, S.Ct. 613, L. Ed.2d 523 (1985)	15
United States v. Grimes, 244 F.3d 375, 384-85 (5th Cir. 2001)	23
United States v. Leal, 74 F.3d 600, 606 (5th Cir. 1996)	23
Winarto v. Toshiba America Electronics Components, Inc., 274 F.3d 1276 (9th Cir. 2001)	27
Wright v. Southland Corporation, 187 F.3d 1287, 1293 fn.8 (11th Cir. 1999)	16, 18-19, 21-22

STATUTES

28 U.S.C. § 1254(1)	1
28 U.S.C. § 1331	3
29 U.S.C. § 621 *et seq*	2
29 U.S.C. § 623(a)	2
29 U.S.C. § 626(c)	3
42 U.S.C. § 2000(e)	2
42 U.S.C. § 2000(e)(2)	2-3
42 U.S.C. § 2000e-2(a)(1)	15

RULES

SUP. CT. R. 13.3	2
SUP. CT. R. 14.1(f)	2

IN THE

Supreme Court of the United States

No. 03-___

DIANA L. READ,

Petitioner,

v.

ALEX BROWN, *et al.*.

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Diana L. Read prays for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit, rendered in these proceedings on July 30, 2003.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unpublished and a copy is contained in the Appendix attached hereto. *See* App. A.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) to review a decision of the United States Court of Appeals for the Fifth Circuit by a writ of certiorari after rendering judgment. The decision for which review is sought

was entered on July 30, 2003. Read timely filed a Petition for Rehearing En Banc, which was denied on August 28, 2003. *See* App. B. Pursuant to SUP. CT. R. 13.3, this petition for writ of certiorari is timely because it is being filed within ninety days after the Fifth Circuit denying the Petition for Rehearing.

STATUTES INVOLVED

This case involved age and gender discrimination under Title VII, 42 U.S.C. § 2000(e) and the ADEA, 29 U.S.C. § 621 *et seq.*

29 U.S.C. § 623(a) prohibits age discrimination and states "It shall be unlawful for an employer (1) . . to discharge any individual or otherwise discriminate any individual . . . because of such individual's age . . ."

42 U.S.C. 2000(e)(2) prohibits gender discrimination and states "It shall be an unlawful employment practice for an employer—(1) . . . to discharge any individual, or otherwise discriminate against any individual . . . because of such individual's . . . sex . . . ."

The Appendix contains the full text of these statutes pursuant to SUP. CT. R. 14.1(f). *See* App. C-D.

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

Read filed her age and gender discrimination complaint and jury demand on July 28, 1999. On January 7, 2002, the district court granted Brown's summary judgment motion and dismissed Read's claims. On January 22, 2002, Read filed a motion for reconsideration and motion to alter and amend judgment. On January 24, 2002, the district court issued an order denying Read's motion for reconsideration and to alter and amend judgment. Read timely appealed to the United States Court of Appeals for the Fifth Circuit on February 8, 2002. Following oral argument, a three-judge panel of the

Fifth Circuit affirmed the judgment of the district court on July 30, 2003. *See* App. A. Read timely filed a petition for rehearing en banc which was denied on August 28, 2003. *See* App. B.

The district court had jurisdiction over Read's claims under the ADEA, 29 U.S.C. § 626(c), Title VII, 42 U.S.C. § 2000(e)(2) and 28 U.S.C. § 1331 (general federal question jurisdiction).

B. Factual Background

Read is a female born February 13, 1946. Read began her career as an investment broker at Merrill Lynch in 1983. BT Alex Brown (Brown) hired Read in April 1994, after Read initially interviewed with Office Manager Mike Crossley. Jeff Rupp also attended Read's interview, but Mike Crossley made the ultimate hiring decision.

Crossley promoted Read to Vice President in six months based on her performance. During the first eight months of Read's career at Alex Brown, Mike Crossley remained her supervisor. Crossley provided Read the support she needed. Crossley spent "real time" with Read to help her develop business. Crossley returned Read's phone calls and responded to her requests. Read had minimal interaction (only one specific meeting) with Jeff Rupp during this period. During this single meeting Rupp apologized to Read for having ignored her and asked her to attend a meeting with him in West Texas. Rupp gave a sexist explanation: he desired Read's presence in West Texas because he was going to call on a female CFO of a trucking company and Read, a female, would be good to take.[1] In fact, Rupp did not take Read to West Texas and Read never attended any sales call with Rupp.

---

[1] This is ageist and/or sexist statement number 1 by Rupp.

Brown gave Mike Crossley's Office Manager job to Jeff Rupp in January 1995. Shortly after Rupp became office manager, Read invited Rupp to breakfast where Rupp told Read that "when brokers get older, they slow down." Rupp told Read that he considered her to be "one of the old ones."[2] Rupp told Read (then age 48 or 49) that he hoped although she was older, she was not going to be slow.[3] Rupp continued to ignore and under support Read. Rupp assigned Read's assistant, Molly to several brokers. Read told Rupp that Molly was unable to accomplish Read's work. After a long delay, Rupp replaced Molly with Sean Power.

Rupp had another candidate for the assistant position, a woman in her mid-forties with considerable experience who was preferred by the brokers. Rupp explained that he hired Power because a male employee would be desirable and because he would like to hire a young man, straight out of college, who would show the "girls . . . how to work."[4] Power did not provide Read the assistance she needed. Read told Rupp about this problem. Rupp would not directly discuss the adequacy of her support. Rupp failed to return Read's phone calls and would not speak with her. The situation with Power never improved.

Rupp provided great support and responded to the male brokers. Jay Ellis, a male broker, testified that once Rupp was asked to do something "he was always willing to help." Steve Kenney, a male broker, testified that Rupp never refused to give Kenney requested support. Kenney testified that Rupp would make time for him if the matter was urgent. Rupp testified that he attended more meetings "than he could

---

[2] This is Rupp's discriminatory statement number 2.

[3] This is discriminatory statement number 3 by Rupp.

[4] This is discriminatory statement number 4 by Rupp, combining sex and age animus.

ever count" with male brokers Durso and High and admitted that there were brokers (all the other brokers were male) with whom he spent more time than Read.

Jeff Rupp actively participated in client meetings with male brokers. The male brokers touted Rupp's ability to close a deal. Jay Ellis testified that he would look to Rupp for support and that Rupp was supportive of Ellis' efforts to grow his business and would attend client meetings with Ellis. Many of Ellis' clients were based in Phoenix and Rupp would travel to meet with them. Steve Kenney testified that Rupp attended roughly a third of his client meetings and that Rupp would definitely "meet with his clients when asked to do so." Other than a single trip to San Antonio, Rupp took no prospecting trips with Read.

Rupp also treated younger and male brokers with more respect than he treated Read (who for most of the time was the only female broker in the office and who was always the only "old," at least per Rupp, female broker in the Dallas office). Rupp yelled at Diana Read in public and was condescending towards her in public. Rupp responded rudely to Read's questions at weekly staff meetings. Rupp's voice and tone insinuated that Read's questions were unwarranted. Male brokers observed Rupp treat Read in a rude and condescending manner. In contrast, male brokers testified that Rupp was never rude to them in public. Rupp did not testify he was rude and condescending to both his male and his female brokers. There is no evidence of comparable rudeness by Rupp to any male broker.[5]

---

[5] The Fifth Circuit decision injects the word "yelled"and states: "Read admitted that Rupp also yelled at a male broker . . . ." (App. at 11a) The situation was very different than incidents where Rupp was rude to Read. The male broker was being rude to Rupp and Rupp reacted. Read testified: "He—we were in a business meeting and Jay was standing behind him opening and closing cabinets or something like that, and Jeff

Read's annual production grew each year during her tenure at Alex Brown. In 1996, Rupp told Read he was not at all worried about her production level. During the fall of 1998 (shortly before he fired Read), Rupp made a passing comment to Read that he had a problem with her production being at $350,000. Read immediately evaluated her production and found that her trailing twelve months of production was $403,296. Read prepared a business plan showing how she expected to improve her production, contacted Rupp and asked for his feedback, but Rupp never followed through after their initial meeting to discuss Read's business plan.

Rupp told Read that her employment was terminated on December 1, 1998. Rupp told Read that she was being terminated as a result of cost-cutting and that she had failed to meet the cut off of $467,000. Read asked why she would be terminated if she was bringing in over $400,000 in commissions. Rupp replied that the cut-off was $467,000. Read called Tim Schweitzer and stated she liked her job at Alex Brown and that she anticipated doing over $400,000 in commissions this year. Schweitzer replied that the cut-off was $467,000 and thus, Read had to be terminated.[6] Read, female, age 52, was the only broker fired in the Dallas office,

---

turned around and *told him* to be quiet or something like that, and he did it in a rather rude manner." (Emphasis added.)

[6] Schweitzer approved the decision to terminate Read.

and she produced comparably or better than five younger and or male brokers:

NAME	SEX	AGE	1988 PRODUCTION
Roger Blackmar	Male	67	$231,775
Bruce Durso	Male	47	$358,855
Chris High	Male	25	$149,181
Jaime Palmer	Male	25	$3,120
Diana Read	Female	52	$297,568* * Per Brown's calculations. Read's evidence shows her production was actually $403, 296.
Lynda Villarreal	Female	28	$10,786

After telling Read she was being terminated, Rupp made a statement indicating both (1) gender bias and (2) that the real reason for termination was not lack of production during Read's job search process. A manager at Oppenheimer who was considering Read for employment asked Rupp why he would choose to terminate a producer like Read. Rupp did not say that Read was not a "producer." Rupp explained his rationale for terminating Read by comparing Alex Brown to Goldman Sachs. Rupp said that Alex Brown is like Goldman Sachs and that Read just did not fit the mold.[7] Goldman Sachs is historically known not to hire women.

---

[7] This is discriminatory statement number 5 by Rupp.

On May 25, 1999, Read filed her charge of age and sex discrimination. Brown disclaimed the "reason" that both Rupp and Schweitzer told Read for her termination, that she had failed to meet the $467,000 production cut-off. Brown kept at least 174 out of 449 brokers nationwide, including 5 other brokers out of 35 in the Dallas office, who failed to meet the "cut-off." In the Dallas office, Brown (and Rupp) kept 4 male brokers who missed the $467,000 cutoff (3 men with lower production than Read) and a young female broker whose production for 1998 was $10,786, far below both Read and the $476,000 cut-off.

Brown denied that Rupp or Schweitzer had given the $467,000 production cutoff reason to Read. Brown admitted that there was no $467,000 cutoff. Brown used an "evolved" reason, still mentioning production, but omitting the $467,000 production cutoff. Brown's interrogatory response claims that Read was terminated "[a]s part of a national expense management reduction process within Bankers Trust and its subsidiaries, the Private Client Division in the Dallas office was required to reduce its expenses. Plaintiff's employment was terminated as a part of this process due to her performance."

REASONS FOR GRANTING THE WRIT

Compelling reasons exist for granting certiorari. The Fifth Circuit's decision in *Read v. BT Alex Brown Inc.* (App. A) discloses a split between the circuits on several important matters. First, there is a split on whether this Court's decision in *Desert Palace v. Costa*, __ U.S. __, 123 S.Ct. 2148 (2003) has any impact on summary judgment analysis, and if so, the extent of the impact. Second, the *Read* decision reveals a split in the circuits on whether *Desert Palace*, a Title VII case, applies to ADEA cases. Third, *Read* applies a definition of "direct evidence" on which the circuits remain sharply split. Fourth and Fifth, the Fifth Circuit in *Read* departs from all the other Circuits by (1) ruling that direct

evidence of discrimination, in effect, lapses -- direct evidence becomes irrelevant after some unspecified amount of time -- and (2) ruling that despite this Court's teachings in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 L.Ed.2d 105 (2000)(reversing the Fifth Circuit), a nonmovant asserting pretext must have "substantial evidence" of pretext, ignoring the nonmovant's best pretext evidence and restating the other pretext evidence in the light most favorable to the movant (employer).

Besides the conflict between the circuits in the Fifth Circuit's *Read* decision, *Read* decides crucial questions of federal law that have not, but should be settled by this Court. In the *Read* case, the Fifth Circuit (1) apparently held that *Desert Palace*, a Title VII case, applies equally to ADEA claims, but (2) mentioned *Desert Palace* only for the proposition that the plaintiff bears the ultimate burden of proving intentional discrimination. The Fifth Circuit analysis indicated that *Desert Palace* has no impact at all on summary judgment analysis. Whether *Desert Palace* applies to ADEA claims, and the effect, if any, of *Desert Palace* on Title VII and ADEA claims attacked on summary judgment, are questions of primal importance

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE OF A SPLIT IN THE CIRCUITS AND THE IMPORTANCE OF ESTABLISHING WHETHER *DESERT PALACE* APPLIES AT THE SUMMARY JUDGMENT PHASE, AND IF SO, WHAT IS ITS IMPACT.

The courts are split on whether *Desert Palace*, which dealt expressly with whether direct evidence was necessary to entitle a claimant to a mixed-motive jury instruction, applies to the courts themselves in their summary judgment analyses. In other words the courts are split on the question of whether juries have one proof mechanism, one where the proof of pretext is not essential for establishing liability in indirect

evidence cases, while the district (and appeals) courts apply different law, law where a plaintiff with only indirect evidence and insufficient evidence of pretext to raise a jury issue must lose.

Besides the obvious impact of *Desert Palace* at the trial phase of discrimination cases, the decision, by shifting the burden of proof to the employer when there is evidence of discrimination, certainly should (despite the Fifth Circuit's approach in *Read*) affect summary judgment practice, thus touching every federal discrimination case, not just those that proceed to trial. Commentators on *Desert Palace* led with the impact of the decision on summary judgment practice. *See* Lawyers Weekly USA, June 23, 2003 at p. 1, Col. 3 and p. 27, Col. 3. After all, under *Desert Palace*, the jury (so why not the judge) applies law that states a plaintiff with evidence (direct or indirect) of prohibited discrimination prevails unless (and the burden shifts to the defendant on this) the defendant establishes by a preponderance of the evidence that it "would have treated the plaintiff similarly even if plaintiff's gender played no role in the employment decision." *Desert Palace, supra*,123 S.Ct. at 2152 (citing the district court's jury instruction). Diana Read either does or does not have a right to have this law applied by the district (and appeals) court to her evidence.

The Fifth Circuit in *Read* dismisses *Desert Palace* as a jury instruction case. *Read* gives *Desert Palace* no impact on the summary judgment analysis, citing to *Desert Palace* but employing pre-*Desert Palace* analysis. Specifically, the Fifth Circuit, within a sentence after citing *Desert Palace*, applies an analysis that gives *Desert Palace* no effect whatever in the summary judgment process. Per the Fifth Circuit in *Read*, direct or indirect evidence are the options, and with indirect the *McDonnell Douglas-Burdine* burden-shifting framework applies. App. A at 5a. Similarly, a district court in the First Circuit effectively precludes application of *Desert Palace* in summary judgment analysis by ruling that, as a matter of law,

the evidence permits "no possibility of a mixed motive for the defendant's actions with respect to this incident." *Davis v. Emery Worldwide Corp.*, 267 F.Supp.2d 109, 120, fn.2 (D. Me. 2003).

The Eighth Circuit has noted, but not decided, the question of whether *Desert Palace* alters the burden-shifting analysis of *McDonnell Douglas* (ruling that the result would be the same, summary judgment affirmed, under either analysis). *Allen v. City of Pocahontas, Arkansas*, 340 F.3d 551, 557 (8th Cir. 2003). Meanwhile, district courts within the Third, Seventh and Eighth Circuits expressly hold that *Desert Palace* law applies during the summary judgment process. *Jackson v. Catholic Charities*, _F.Supp.2d _, 2003 WL 22533330, *2 (D.Minn. 2003); *Dunbar v. Pepsi-Cola General Bottlers of Iowa, Inc.*, _ F.Supp.2d _, 2003 WL 22290229 *11 (N.D.Iowa, 2003); *Thompson v. Proviso Township High Schools Dist. 209*, _ F.Supp.2d _, 2003 WL 21638808, *8 (N.D.Ill. 2003); *Griffith v. City of Des Moines*, _F.Supp.2d _, 2003 WL 21976027 (S.D. Iowa, 2003); *Campetti v. Career Educ. Corp.*, _ F.Supp.2d _, 2003 WL 21961438 (E.D.Pa. 2003); *Dare v. Wal-Mart Stores, Inc.*, 267 F.Supp.2d 987, 992 (D.Minn. 2003); *Gonzales v. City of Minneapolis*, 267 F.Supp. 1004, 1010 (D. Minn. 2003).

The most thorough analysis of *Desert Palace* and the law for purposes of summary judgment is in the opinion of Chief Judge Bennett of the Northern District of Iowa in *Dunbar v. Pepsi-Cola General Bottlers of Iowa, Inc.*, _ F.Supp.2d _, 2003 WL 22290229 *9-15 (N.D. Iowa, 2003). More succinctly, Chief Judge Longstaff of the Southern District of Iowa defines the post *Desert Palace* test for surviving summary judgment:

> This Court . . . finds that a plaintiff may bring his Title VII claim "according to the burdens articulated in [the] Civil Rights Act of 1991," without being confined to the

> strictures of the *McDonnell Douglas* burden-shifting framework. [*Citing Dare, supra.*]
>
> . . . Thus, to survive summary judgment, plaintiff must simply demonstrate that a genuine issue of material fact exists as to whether or not race was a motivating factor in an adverse employment action defendant [sic] suffered.

In *Dare*, cited by both Chief Judges Bennett and Longstaff, Judge Magnuson of the District Court of Minnesota explained:

> The dichotomy produced by the *McDonnell Douglas* framework is a false one. In practice, few employment decisions are made soley on the basis of one rationale to the exclusion of all others.

Dare v. Wal-Mart Stores, Inc., 267 F.Supp.2d 987, 991 (D.Minn. 2003).

The courts who consider summary judgment motions face a choice. They can continue to apply the false dichotomy of pre *Desert Palace* analysis, or they can apply an analysis that is consistent with the law the jury will be given if the plaintiff survives summary judgment. It is important for this Court to decide soon which is correct, the Fifth Circuit's approach in *Read*, where *Desert Palace* law has no place in deciding summary judgment motions, or the emerging caselaw that applies *Desert Palace* at the summary judgment stage.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE OF A SPLIT IN THE CIRCUITS AND THE IMPORTANCE OF ESTABLISHING WHETHER *DESERT PALACE* APPLIES UNDER THE ADEA AS WELL AS UNDER TITLE VII.

The Circuits are split as to whether *Desert Palace* applies to ADEA cases. *Desert Palace* is a Title VII decision. *Desert Palace* answered an important question concerning the

availability of mixed-motive jury instructions under Title VII. The Court's ruling hinged on the 1991 Civil Rights Act, an act which did not amend the ADEA. *Desert Palace* predictably has spawned arguments by ADEA defendants that this Title VII ruling has no application under the ADEA and the contrary argument by ADEA plaintiffs. *See* Lawyers Weekly USA, June 23, 2003 at p. 1 and p. 27, Col. 4. *Read* is both a Title VII (gender) and ADEA (age) case. Thus, *Read* squarely poses the question of whether ADEA plaintiffs face a higher evidentiary burden than Title VII claimants.

The lower circuits and lower courts are providing different answers to this outcome determinative question.[8] Although the Fifth Circuit in *Read* gave *Desert Palace* no impact on the summary judgment analysis, citing to *Desert Palace* but employing pre-*Desert Palace* analysis (direct evidence or indirect evidence are the options, and with indirect the *McDonnell Douglas-Burdine* burden-shifting framework applies)(App. A at 5a), the Fifth Circuit held, "'The same evidentiary procedure for allocating burdens of proof applies to discrimination claims under [either Title VII or the ADEA].'" *Read*, App. A at 5a, *citing Bauer v. Albemarle Corp.*, 169 F.3d 962, 966 (5th Cir. 1999). Within the Seventh Circuit, a district court has applied the *Desert Palace* proof standard to an ADEA claim. *Thompson v. Proviso Township High Schools Dist. 209*, _ F.Supp.2d _, 2003 WL 21638808, *8 (N.D.Ill. 2003).

---

[8] The Fourth Circuit in *Rowland v. American General Finance, Inc.*, 340 F.3d 187 (4th Cir. 2003), reversed a jury verdict because the plaintiff had been denied a *Desert Palace* mixed motive instruction. Judge Motz explained: "Moreover, there is no question that without the mixed-motive instruction, Rowland had almost no chance of prevailing. Had the district court given the requested instruction, on the other hand, it is at least possible that the jury would have found that gender was 'a motivating factor' in American General's failure to promote Rowland." *Id.* at 194.

Meanwhile, the Fourth Circuit has noted the question of whether *Desert Palace*, at Title VII case, applies to age discrimination cases under the ADEA. *Kozlowski v. Hampton School Bd.*, _ F.3._, 2003 WL 22273073, *4 (4th Cir. 2003). The Fourth Circuit declined to answer that question. *Id.* A district court in the Sixth Circuit has flatly, but without analysis, ruled that *Desert Palace*, a Title VII case, does not apply to age discrimination cases. *Bolander v. BP Oil Co.*, _ F.Supp.2d _, 2003 WL 22060351 (N.D.Ohio, 2003). It is readily apparent that a full fledged and outcome determinative split between the circuits is upon us and that the High Court should step in early with clarification.

For the well-being of the federal court system, it is critical that *Desert Palace* have a companion case, where this Court determines the proof mechanism in ADEA cases. In virtually every case where the plaintiff has evidence of age discrimination and the defendant asserts that some other reason, not age, triggered the firing, unless the defendant yields to a *Desert Palace* proof analysis for summary judgment and jury instruction for trial,[9] the lower court judges must decide whether the ADEA and Title VII are different on the all important question of proof. Unless and until this Court resolves that inevitable question, every ADEA case that goes to trial in the United States is subject to reversal on this question.

There is a powerful federal interest in uniformity of proof mechanisms in federal anti-discrimination laws. The courts, litigants and practitioners will face a procedural nightmare if juries must parse through different proof mechanisms, in the

---

[9] The Fourth Circuit in *Kozlowski*, *supra*, 2003 WL 22273073, *4, was not required to answer whether *Desert Palace* applied to an ADEA case because it found that the district court's jury "instruction satisfied *Desert Palace* even if that decision applies to the ADEA."

same trial, depending upon the basis of the discrimination claim. Aside from using "age" in the ADEA and "race, etc." in Title VII, the two laws employ essentially identical prohibitory language. The Supreme Court has used practically identical interpretive regimes when applying the two laws. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S.Ct. 613, 621-22, 83 L. Ed.2d 523 (1985). Numerous courts, even after the passage of the 1991 Civil Rights Act (which did not amend the ADEA), have continued to construe Title VII and the ADEA in a consistent manner. *See, e.g. McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 115 S.Ct. 879, 884, 885 (1995); *Fisher v. Transco Services-Milwaukee, Inc.*, 979 F.2d 1239, 1245, n. 4 (7th Cir. 1992); *Rangel v. El Paso Natural Gas Co.*, 996 F.Supp. 1093, 1097 (D.N. M. 1999); *Hornsfeld v. City of North Miami Beach*, 29 F. Supp.2d 1357, 1365 (S.D. Fla 1998). Within the Eighth Circuit, based on the "interests of uniformity" in Federal anti-discrimination laws, a district court has already held that *Desert Palace*, at Title VII case, applies to ADA disparate treatment claims, including perceived disability claims. *Skomsky v. Speedway Superamerica, L.L.C.*, 267 F.Supp.2d 995, 1000 (D. Minn. 2003).

In *Reeves* (an ADEA case), the Court noted:

> This Court has not squarely addressed whether the *McDonnell Douglas* framework, developed to assess claims brought under § 703(a)(1) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, 42 U.S.C. § 2000e-2(a)(1), also applies to ADEA actions. Because the parties do not dispute this issue, we shall assume, *arguendo*, that the *McDonnell Douglas* framework is fully applicable here.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147 L.Ed2d 105, 120 S.Ct. 2097, 2105 (2000)(emphasis added). While plaintiffs and defendants may not dispute the applicability of the *McDonnell Douglas* framework in ADEA

cases, they certainly will dispute the applicability of *Desert Palace*, because of its burden shifting feature. Stated another way, this issue will not "wait." The courts are at a crossroads. They can either continue on the road with a map, so they know with certainty whether *Desert Palace* applies in ADEA cases, or they can litigate this issue in every ADEA case until the Court gives direction. Litigating all ADEA cases with no map on this determinative issue will waste untold judicial resources. Every case where the judge was "wrong" has to be redone.

The district courts are *now* faced with the "reversible error" question of whether the Court's holding in *Desert Palace* applies in ADEA cases. A ruling to the contrary would place age discrimination claimants in substantially worse position than Title VII claimants and undermine the interests of uniformity in discrimination litigation. There is now a compelling need for swift resolution of this issue. No ruling, the result if certiorari is not granted for Read, will cripple the lower courts in ADEA cases for the foreseeable future.

III. THIS COURT SHOULD GRANT CERTIORARI BECAUSE OF A SPLIT IN THE CIRCUITS OVER THE DEFINITION OF DIRECT EVIDENCE, THE CONFLICT BETWEEN THE FIFTH CIRCUIT RULE AND *PRICE WATERHOUSE V. HOPKINS* AND THE NEED FOR A WORKABLE DEFINITION

Defining "direct evidence" properly in employment discrimination cases is important for two main reasons. First, (at least prior to *Desert Palace*) direct evidence was one of two basic proof schemes [10] available to a plaintiff. *Desert*

---

[10] The Eleventh Circuit in *Wright v. Southland Corporation*, 187 F.3d 1287, 1293, fn. 8 (11th Cir. 1999) observed that a third method of proving discriminatory treatment, statistical proof of a pattern of discrimination,

Palace held that "direct evidence" is not required in order to prove employment discrimination in mixed-motive cases under Title VII. The Court stated:

> Of course, in light of our conclusion that direct evidence is not required under § 2000e-(2)(m), we need not address the second question on which we granted certiorari: "What are the appropriate standards for lower courts to follow in making a direct-evidence determine-ation in 'mixed motive' cases under Title VII?" Pet. for Cert. i.

Desert Palace, supra, 123 S.Ct. at 2155, fn. 3. While the litigants in *Desert Palace* had no need for the Court to address the conflict between the circuits as to the definition of direct evidence, the circuits and the lower courts still need guidance. The Fifth Circuit's decision in *Read* is proof. The Fifth Circuit cited *Desert Palace* (App. A at 5a), but affirmed summary judgment against Diana Read by scrutinizing her proof under its harsh, dictionary definition of direct evidence (App. A at 12a). Certainly until and unless this Court answers Question 1 in this petition for certiorari in the affirmative, the direct evidence split in the circuits means the difference between being able to enforce discrimination laws and being doomed to defeat in the absence of a confession.

The pre and post *Desert Palace* inquiry about direct evidence flows from several landmark decisions. As the Court explained in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 67 L.Ed 2d 207, 256 (1981), after an

---

may be a separate and distinct method of proving discriminatory treatment. *Id.* at 1293, fn. 8. Both the district and appeals court in *Read* do not disclose critical context evidence. Out of 19 to 26 brokers in the Dallas office, except for a brief period after a much younger, and unqualified female, Lynda Villareal, was promoted to broker along with Read, Read was the one and only female broker in the office throughout her tenure with Brown.

employment discrimination claimant makes a *prima facie* case and the defendant meets its burden of production by presenting a legitimate, non-discriminatory reason, the plaintiff retains the burden of persuading the court that he "has been a victim of intentional discrimination." *Id.* The plaintiff "may succeed in this either *directly* by persuading the Court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* (emphasis added)(citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 1825-26 (1973). Thus, direct evidence obviates the need for a pretext analysis under *McDonnell Douglas*. As explained by the 11th Circuit in *Wright v. Southland Corporation*, 187 F.3d 1287, 1293:

> The importance of properly defining "direct evidence" arises from our repeated statements that when a plaintiff has direct evidence of illegal discrimination, he need not make use of the *McDonnell-Douglas* presumption, and conversely, when he does not have such evidence, he is required to rely on the *McDonnell-Douglas* presumption.

Prior to *Desert Palace*, the second reason "direct evidence" had an important meaning in employment discrimination was that it would trigger or permit a burden shifting "mixed motive" jury instruction. In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 104 L.Ed. 2d 268 (1989), Justice O'Connor's concurring opinion would permit the use of the mixed motive test only when direct evidence is present. *Id.* at 109 S.Ct. 1775. In this scenario, the burden of persuasion itself may "shift to the employer to demonstrate by a preponderance of the evidence that it would have reached the same decision ... absent consideration of [the protected characteristic]." *Price Waterhouse*, *supra*, 109 S.Ct. at 1796 (O'Connor, concurring opinion). After the Supreme Court's decision in *Desert Palace*, a plaintiff may obtain a mixed-motive jury instruction under Title VII on the basis of circumstantial evidence alone and is not required to submit direct evidence

of discrimination in order to obtain the instruction. *Desert Palace*, 123 S.Ct. 2148, 2155 (2003).

The circuits remain split as to the definition of "direct evidence." Some circuits require substantial evidence of discriminatory animus to constitute "direct evidence." The Eleventh Circuit in *Wright*, *supra*, 187 F.3d at 1293 holds:

> "[D]irect evidence," in the context of employment discrimination law, means evidence from which a reasonable trier of fact could find, more probably than not, a causal link between an adverse employment action and a protected personal characteristic."

This is the "**preponderance definition**" of direct evidence. *Id.* at 1301. *Wright* contrasted the preponderance definition with the "**dictionary definition**," which is "evidence, which if believed, proves the existence of a fact in issue without inference or presumption." *Id.* at 1294. This was the definition in the Eleventh Circuit at the time of the *Wright* decision. The Eleventh Circuit noted the flaw in the dictionary definition:

> The only "eyewitness" to the state of mind of the decisionmaker is the decisionmaker himself. Consequently, the only direct evidence of illegal discrimination under the dictionary definition would be testimony from the decisionmaker that he took an adverse employment action against the plaintiff on the basis of a protected personal characteristic. Any other form of evidence requires at least one inference to reach the conclusion that the employer has impermissibly discriminated.

Id. at 1295 (footnote omitted).

The court in *Wright* also examined Eleventh Circuit precedent. It found that, while the majority of cases stated the dictionary definition of direct evidence, the courts were in practice using the preponderance definition. *Id.* at 1294-1300. "Regardless of the stated definitions of direct evidence

in these cases, however, a look at the actual holdings of these cases reveals that they all rely on the preponderance definition." *Id.* at 1294.

This "preponderance definition" is consistent with logic and the use of the term "direct evidence" by Justice O'Connor in *Price Waterhouse*. In her concurring opinion, Justice O'Connor set out the "direct evidence" requirement as the necessary threshold for triggering mixed motives analysis. *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring in judgement). Justice O'Connor stated that the plaintiff must produce "*direct evidence* that an illegitimate criterion was a *substantial factor* in the [employment] decision." *Id.* (Emphasis added.) Justice O'Connor, as well as the plurality of the Court, was concerned that employment discrimination plaintiffs often cannot pinpoint discrimination as the precise cause of their injury, despite having shown that it played a significant role in the decisional process. Thus, the *Price Waterhouse* burden shifting paradigm was born. *Id.* at 273 (O'Connor, J., concurring opinion). While a dictionary definition of direct evidence effectively requires a confession by the decisionmaker, Justice O'Connor plainly recognized that direct evidence does not require a confession, or even evidence that prohibited discriminatory animus was the sole factor in the adverse employment action. After all, Justice O'Connor was writing about "mixed motive" cases. Thus, a definition that requires "proof of the fact of discriminatory animus without inference or presumption," the Fifth Circuit standard employed in *Read*, goes far beyond the direct evidence required for a mixed motive instruction.

Read states the dictionary definition (App. A at 12a)[11] and applies it where a "preponderance definition," particularly under the summary judgment guidelines set out in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000), would have easily produced a "direct evidence" label requiring denial of the employer's summary judgment motion. The Fifth Circuit in *Read* discussed three pieces of evidence Read claimed to be direct and found two of them difficient because they both required an inference to be probative of Brown's discriminatory animus in firing Read, so not "direct." (As to Diana Read's evidence the Fifth Circuit concluded "may arguably fall within the definition of direct evidence of discrimination" (App. A at 14a), this evidence, per the Fifth Circuit, was too old. We address this ruling in Part IV of this petition.

The Fifth Circuit's use of the dictionary definition of direct evidence in *Read* illustrates the importance of the question and the wisdom of the Eleventh Circuit's observation that "the general evidentiary rule in federal courts [is] that circumstantial and direct evidence are treated alike. *Wright*, *supra* at 1300. Petitioner respectfully submits that this Court should resolve the split in the circuits and foster the purposes of federal laws against employment discrimination by rejecting the dictionary definition of direct evidence employed by

---

[11] The Fifth Circuit cites *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897 (5th Cir. 2002)(App. At 12a) for the definition of direct evidence as "evidence that, if believed, proves the fact of discriminatory animus without inference or presumption." This Court denied certiorari in *Sandstad* on the question of how to define direct evidence on June 16, 2003, about a month an a half before the Fifth Circuit used the *Sandstad* dictionary definition of direct evidence as a basis for (1) concluding that Diana Read had no direct evidence (except some that was the wrong "vintage"—App. A at 14a) so that (2) when her showing of pretext, in the Fifth Circuit's view, failed, summary judgment was proper.

the Fifth Circuit in *Read* and approving the preponderance definition and this reasoning of the Eleventh Circuit:

> If direct evidence were to mean only evidence that proves discrimination without presumption or inference, then we would have created a system in which a plaintiff would be denied the opportunity to recover for employment discrimination despite the fact that he could prove such discrimination by a preponderance of the (circumstantial) evidence.

Wright, supra at 1301.

IV. THIS COURT SHOULD GRANT CERTIORARI BECAUSE OF A SPLIT IN THE CIRCUITS IN GIVING EFFECT TO *REEVES* AND THE IMPORTANCE OF ADHERING TO *REEVES* AND OTHER DECISIONS OF THIS COURT.

A. The Fifth Circuit in *Read* Breaks With All Other Circuits and Undermines Important Rulings of this Court by Ruling that Direct Evidence of Prohibited Discrimination Expires as a Matter of Law; If Direct Evidence "Expires," It Is Important to Know the Shelf Life of Direct Evidence.

Although the Fifth Circuit mentioned discriminatory statements in its fact recitation (App. A, at 2a-3a), when it disposed of this evidence, the Panel glossed the evidence to one milder version, "Rupp's 1995 comment to Read that brokers tend to slow as they age." *Id.*[12] The Panel conceded this is direct evidence of discrimination but held that "given

---

[12] At a breakfast meeting Read invited Rupp to attend after Rupp had ignored her since she had been hired, Rupp told Read that "when brokers get older, they slow down" and that he considered her to be "one of the old ones."

this comment's vintage, as well as Read's failure to identify any other like comments in the course of her four-year tenure with Brown, we cannot view this statement as anything more than a stray remark." [13]

The Panel's "vintage" ruling conflicts with *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 2110 and the Fifth Circuit's ruling in *Blow v. City of San Antonio, Texas*, 236 F.3d 293, 296 (5th Cir. 2001).[14] These cases require the court to draw all reasonable inferences in favor of the non-moving party in the light most favorable to the non-moving party. The Panel's "vintage" reasoning relies upon an inference favoring Brown that, as a matter of law, Rupp's age bias against Read somehow disappeared sometime before he fired her. The inference is particularly remarkable since it assumes (as a matter of law) that Rupp's bias against Read disappeared as Read grew older. Moreover, reading the facts in the light most favorable to Read, a jury could reasonably conclude that Rupp's bias remained in play throughout Read's employment with Brown, from the time Rupp ignored her before he became the office manager, through the time of his breakfast declaration, through the time he was rude to her, through the time that he ignored her, through the time he stated he wanted to hire a young man who would show the "girls" how to work, and through the time that he explained after firing Read that she did not fit the mold, the Goldman Sachs image.

---

[13] As argued in Section III of this Argument, the Panel erred in ignoring Read's evidence. The second prong of the Panel's reasoning in discarding Read's direct evidence ignores or erases Rupp's discriminatory statements 1, 4, and 5, "like comments" that are in evidence.

[14] The ruling also conflicts with Fifth Circuit holdings under Rule 404(b), F.R.E., that other bad acts evidence is not stale up to 4 years "old," but 10 years is "too great a gap in time." *United States v. Grimes*, 244 F.3d 375, 384-85 (5th Cir. 2001); *United States v. Leal*, 74 F.3d 600, 606 (5th Cir. 1996).

The district court's ruling that, as a matter of law, vintage age bias evidence is irrelevant conflicts with the Supreme Court's decision in *Miller-El v. Cockrel*, 537 U.S. 322, 123 S.Ct. 1029 (2003). *Miller-El* dealt with the Dallas County District Attorney's Office policy of instructing Assistant District Attorneys not to select African Americans for jury service. *Id.* at 1038-9. The Office issued a manual in 1968, in circulation until at least 1976, that included reasons for excluding minorities from jury service. *Id.* The Court found this evidence must be considered in determining whether racial animus prompted peremptory strikes of African American jurors in a 1986 death penalty case. *Id.* at 1034. The Supreme Court held that statements made even more than twenty (20) years before the event in question must be considered. *Id.* at 1045.

The Court should address whether under *Miller-El*, Rupp's ageist statements somehow "expire" after a time (and if so, when) as a matter of law.

B. The Fifth Circuit in *Read* Departs from All Other Circuits and Undermines *Reeves* by Ruling That Nonmovants Asserting Pretext Must Have "Substantial Evidence" of Pretext, Ignoring Nonmovant's Best Pretext Evidence and Restating Her Other Evidence of Pretext in the Light Most Favorable to the Employer.

1. In *Read* the Fifth Circuit Requires the Movant to Have "Substantial Evidence" of Pretext.

In *Reeves*, the Court addressed pretext evidence, holding that "a plaintiff's prima facie case combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 120 S.Ct. at 2109. The Court explained further that in narrow instances a

plaintiff might "set forth sufficient evidence to reject the defendant's explanation," but summary judgment should still be granted:

> For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, non-discriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Id. (emphasis added).

Other circuits have uniformly adhered to this ruling. *See Goodman v. Pennsylvania Turnpike Comm.*, 293 F.3d 655, 673-74 (2nd Cir. 2002); *Dugan v. Albermarle County School Board*, 293 F.3d 716, 721 (4th Cir. 2002); *O'Neal v. City of New Albany*, 293 F.3d 998, 1005 (7th Cir. 2002).

Using a *McDonnell-Douglas-Burdine* analysis (not *Desert Palace*), the Fifth Circuit in *Read* ruled that after a *prima facie* case and defendant's production of a legitimate, non-discriminatory reason, "the plaintiff "thereupon, must produce substantial evidence that the defendant's non-discriminatory reason is merely a pretext for impermissible discrimination." App. A at 6a (emphasis added). *Read* thus rejects a central holding of *Reeves* by converting narrow exceptions into the rule. In *Reeves* this Court, speaking of the Fifth Circuit, stated: "the Court of Appeals misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence." *Reeves*, 120 S.Ct. at 2108. Now the Fifth Circuit has recreated its split with the other circuits, who adhere to *Reeves*, and placed an impermissible substantial burden on those who pursue discrimination claims with in direct evidence.

2. In *Read* the Fifth Circuit Reverts to its pre-*Reeves* Summary Judgment Approach of Omitting Favorable Evidence to the Nonmovant and Viewing Evidence in Favor of the Employer.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2997 (2000), unanimously reversed the Fifth Circuit Court of Appeals, ruling, "it is apparent that respondent was not entitled to judgment as a matter of law." *Id.* at 120 S.Ct. 2110. The Court in *Reeves* did not merely reject the "pretext-plus" special rule of the Fifth Circuit that "misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence." *Id.* at 2108. The Court in *Reeves* also rejected the Fifth Circuit's approach under Rules 50 and 56, F.R.C.P., by ruling that in judgment as a matter of law and in the summary judgment process[15] the court should review the record as a whole but may not make credibility determinations or weigh evidence and

> must disregard all evidence favorable to the moving party that the jury is not required to believe. *See Wright & Miller*, 299. That is, the court should give credence to the evidence favoring the non-movant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses. *Id.* at 300.

Reeves, *supra*, at 2110. *Reeves* requires that summary judgment judges "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility

---

[15] *Reeves* reiterates that "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same. 120 S.Ct. at 2110, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

determinations or weigh the evidence." *Id.* Weighing evidence and drawing inferences from the fact are jury functions. *Id.*

Other circuits have adhered to these rulings. *See Otero v. Bridgeport Housing Authority,* 297 F.3d 142, 151 (2d Cir. 2002); *Mickle v. Morrin*, 297 F.3d 114, 120 (2d Cir. 2002); *Winarto v. Toshiba America Electronics Components, Inc.*, 274 F.3d 1276, 1283 (9th Cir. 2001);

The Fifth Circuit does not adhere to the law of summary judgment as announced in *Reeves*. The Fifth Circuit in *Read* cites *Reeves* (App. A at 4a), does not mention the particulars (like drawing all inferences in favor of Read), then retreats to the same flawed approach that this Court reversed in *Reeves*. The Fifth Circuit used Brown's version of the facts, cited at page 15 of Brown's brief.[16] Citing testimony offered by Brown, the Fifth Circuit concluded, "this testimony, however, does not establish that Brown terminated Read for failing to reach $467,000 in production, nor does it therefore establish that Brown dissembled or changed its reason for discharging Brown from a failure to reach a particular production number to a general failure to perform." (App. A at 16a.)

Diana Read's evidence, however, included this testimony by Read about what Rupp told her: "He said we're cost cutting and the cutoff was 467,000 and that was the reason for my termination is my production was not up to 467,000. (7 R. App. 0136). Read testified that when she called Schweitzer, the first thing he said was:

> He said—I said was I really liked my job and I was going to do over 400,000 this year and why did he see fit to be terminating me, and he said, well the cutoff's 467.

(7R. App. 0140)

---

[16] Brown erroneously cited the reference to some of Read's testimony as 3 R. App. 114. The correct cite is 2 R. App. 114. References in Part IV are to the Appellate Record.

The Fifth Circuit disregarded this testimony on summary judgment.

The Fifth Circuit analysis also ignored Read's other evidence that Brown offered inconsistent explanations for her termination. The court notes, "Brown maintains that Read was selected for termination, based on her performance as a broker, in connection with a wider effort to reduce costs." App. A at 15a. In the context of rejecting it as direct evidence, the Fifth Circuit discussed Read's evidence that Rupp told a manager at Oppenheimer who was considering Read for employment that his reason for terminating Read was that Brown is like Goldman Sachs and that Read just did not fit the mold. (7R. App. 00126). App. A at 12a. In the pretext context, the court ignored this evidence that Rupp told a manager at Oppenheimer a reason for terminating Read that has nothing to do with production and provides a reason different from Brown's response to Read's discrimination claim.

Read conflicts with *Reeves* repeatedly as the Fifth Circuit panel viewed the evidence in the light most favorable to Brown. At App. A, 2a, the court writes: "The first sign of discord appeared in January 1995 when, shortly after assuming responsibility for the Dallas office, Rupp attended a breakfast meeting with Read [and made the "old and slow" comments]. The Fifth Circuit omits the fact that the first sign of discord was earlier, when Rupp generally ignored Read and gave a sexist explanation for why he wanted to have her attend a meeting with a female CFO, since Read was a female. (7R. App. 0122, 8 R. App. 0204)

The *Read* court ignored Read's evidence that Rupp ignored Read after he became manager of the Dallas office except for dismissing Read's testimony that Rupp refused to return her phone calls as a "conclusory [allegation]." App. A, 11a. At the same time, the Panel warped the facts concerning Rupp's rude treatment of Read by converting Read's testimony that what Rupp told a male broker who was interrupting him

during a meeting into "Rupp also yelled at a male broker." *Id.* The Panel also viewed the evidence in Brown's favor to conclude (in conclusory fashion) that the five employees Brown kept while terminating Read, whose production numbers were similar or inferior, were not similarly situated. App. A at 17a.

CONCLUSION

For the reasons stated herein, the petition for writ of certiorari should be granted.

Respectfully submitted,

HAL K. GILLESPIE *
GILLESPIE, ROZEN
& WATSKY, P.C.
3402 Oak Grove Avenue
Suite 200
Dallas, Texas 75204
214-720-2009

* Counsel of Record